

No. 10-1259

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTOINE JONES

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

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The court of appeals’ decision leaves law enforcement officers with no practical guidance about when a warrant is required to monitor a vehicle on public roads using a GPS device and creates a circuit split on that question. Until this Court intervenes, law enforcement officers will be deprived of an important tool for investigating leads and tips on drug trafficking, terrorism, and other crimes. Respondent’s arguments against granting review are unpersuasive.

A. The Question Presented Warrants Immediate Review

1. Respondent’s brief in opposition only serves to highlight the need for this Court to provide practical guidance about when a warrant is required before officers may use a GPS device to monitor a vehicle’s public movements. In an attempt to minimize the detrimental effect that the court of appeals’ decision will have on criminal investigations, respondent characterizes the decision as “merely [holding]

that the government engages in a Fourth Amendment search when it conducts 24-hour GPS tracking for an extended period of time, beyond what is feasible through visual surveillance, and to an extent that allows the recording of patterns of movement.” Br. in Opp. 28 (emphasis omitted). No workable standard can be derived from that “holding.”

The court of appeals gives no guidance about how long between a few hours and 28 days constitutes “an extended period of time.”¹ Nor is it possible to determine the point at which an investigation would cease to be “feasible through visual surveillance.” The feasibility of visual surveillance in any given case would depend on the importance of the target relative to the resources of the law enforcement agency conducting the surveillance.² And law enforcement officers could not always be expected to know, especially at the outset of an investigation, whether the vehicle’s future movements will “allow[] the recording of patterns,” or whether the vehicle is about to embark on discrete journeys.

Unless this Court intervenes, the court of appeals’ decision will curtail law enforcement’s ability to use this impor-

¹ Respondent contends (Br. in Opp. 4) that officers in this case could not rely on the warrant they had obtained in part because the officers “decided to use the GPS device to record [respondent’s] movements * * * for four weeks,” which was “far beyond the ten days that had been authorized under the expired warrant.” That is incorrect. Although the officers did not comply with the warrant’s restrictions on installation (Pet. 3), the warrant authorized the officers to leave the device in place for 90 days. See 1:05-cr-00386-ESH Docket entry No. 150-1, at 2 (D.D.C. July 23, 2006).

² For example, agents from the Federal Bureau of Investigation followed terrorism suspect Najibullah Zazi as he drove 1,800 miles from Denver to New York, often reaching speeds of over 100 miles per hour. See David Johnston & William Rashbaum, *Rush for Clues Before Charges In Terrorism Case*, N.Y. Times, Oct. 1, 2009, at A1, A30.

tant investigatory tool. As the petition explains (Pet. 24), federal law enforcement agencies frequently use tracking devices to follow leads and tips before suspicions have ripened into probable cause and without a clear idea of how long it will take to gather useful information. The court of appeals' decision will effectively require law enforcement officers to obtain a warrant before placing a GPS monitor on a vehicle in many scenarios, which will seriously impede criminal investigations.

2. Respondent further contends (Br. in Opp. 28), that the court of appeals' decision will not call into question other common investigatory practices because the court "explicitly stated that its ruling would not apply beyond the precise facts and issues presented." To the contrary, the court explicitly left open the question whether its aggregation theory would apply to prolonged visual surveillance. Pet. App. 38a ("[W]e reserve the lawfulness of prolonged visual surveillance"). Many other non-search investigatory practices such as protracted use of pen registers, repeated trash pulls, and aggregation of financial data can likewise reveal immense amounts of information about a person's life. Pet. 25-26. The court of appeals offers no reason why its aggregation theory would not undermine those investigatory practices. Neither does respondent.

3. Notwithstanding the lack of practical guidance and the potential for the court's decision to destabilize Fourth Amendment law, respondent contends (Br. in Opp. 24-25) that this Court's review of the question presented would be premature because GPS technology is "technologically complex" and its role in society is still emerging. That argument is unpersuasive. GPS devices use ascertainable technology that performs the same function as the beeper technology that this Court has previously considered in *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v.*

Karo, 468 U.S. 705 (1984)—they monitor a vehicle’s movements on public roads. As explained in the petition (Pet. 13-14), the enhanced accuracy of GPS technology does not change the analysis.

Nor does the potential future development of “GPS products * * * that will be small enough to implant under the human skin” (Br. in Opp. 25) counsel against review. Monitoring a person’s movements through a device implanted in the body raises serious constitutional questions that are far beyond the scope of the question presented, which is clearly limited to GPS tracking of respondent’s vehicle on public roads. Pet. I. Future developments in GPS technology do not provide a compelling reason for this Court to withhold guidance on a present-day technology applied in a recurring fact pattern.

B. The Decision Below Creates A Circuit Conflict

Respondent contends (Br. in Opp. 19-23) that the decision below does not conflict with decisions of the Seventh, Eighth, and Ninth Circuits because those courts did not consider 24-hour GPS monitoring over a prolonged period, to an extent not feasible by visual surveillance, and that revealed information about the subject’s patterns. *Id.* at 20. The facts and holdings of those cases, however, refute respondent’s efforts to distinguish them.

1. In *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010), petition for cert. pending, No. 10-7515 (filed Nov. 10, 2010), agents from the Drug Enforcement Administration monitored the defendant’s vehicle with various tracking devices “[o]ver a four-month period,” and the devices revealed that the defendant repeatedly traveled to a suspected marijuana grow site. *Id.* at 1213. The Ninth Circuit thus considered pro-

longed GPS monitoring, for a period that respondent argues would not be feasible by visual surveillance, that revealed information about the defendant's patterns, and the court held that no search had occurred. *Id.* at 1216-1217.

Respondent contends (Br. in Opp. 20) that the defendant in *Pineda-Moreno* “‘acknowledged’ that *Knotts* was controlling,” but that is incorrect. Pineda-Moreno acknowledged the holding of *Knotts*, see 591 F.3d at 1216, but he argued that “*Knotts* should not control his case,” because (he asserted) the use of GPS technology to obtain information beyond what the general public could observe constituted a search under the Fourth Amendment. *Ibid.* The question presented in Pineda-Moreno’s petition for certiorari is the same question presented in this case. See Pet. at i, *Pineda-Moreno*, *supra* (No. 10-7515). And the Ninth Circuit’s holding that the months-long tracking of the defendant’s vehicle was not a search because “[t]he only information the agents obtained from the tracking devices was * * * information the agents could have obtained by following the car,” 591 F.3d at 1216, leaves no room for future panels to hold that prolonged monitoring constitutes a search if it reveals anything more than information about a discrete journey.

2. Respondent’s attempt to minimize the conflict with the Eighth Circuit’s decision in *United States v. Marquez*, 605 F.3d 604 (2010), is also unpersuasive. The Eighth Circuit’s holding in *Marquez* is admittedly narrower than *Pineda-Moreno*’s holding. See *id.* at 610 (holding that “when police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking

device on it for a reasonable period of time”).³ But respondent erroneously suggests (Br. in Opp. 20) that the Eighth Circuit might decide future cases differently if they involved more than “information about discrete journeys.” The Eighth Circuit was clearly informed that agents had been tracking the defendant’s vehicle for five months, see Gov’t C.A. Br. 4-8, *Marquez*, *supra* (No. 09-1743), and the court nevertheless concluded that the monitoring had remained within “a reasonable period of time.” 605 F.3d at 610.

3. Respondent correctly points out (Br. in Opp. 21-22) that in a case decided after the petition was filed, the Seventh Circuit has stated that its previous panel decision in *United States v. Garcia*, 474 F.3d 994, cert. denied, 552 U.S. 883 (2007), would not necessarily control in a case where GPS surveillance of a vehicle was “lengthy” and exposed “the twists and turns of [the sub-

³ Respondent acknowledges (Br. in Opp. 18 n.3) that it would be possible for this Court to hold “that prolonged GPS tracking is a search, but that only reasonable suspicion is required” for the search to be reasonable. Respondent contends, however, that the government “failed to develop an evidentiary basis for this argument” and that it is “too late for the government to make the argument now.” *Ibid.*; *id.* at 28. The record in this case demonstrates that the officers not only had reasonable suspicion that respondent was involved in criminal activity, their suspicion was supported by probable cause. See Pet. App. 15a-16a, 38a-39a n.* (noting that officers had obtained a warrant). Moreover, this Court has previously held that a search based on reasonable suspicion was reasonable under the Fourth Amendment, even when the government defended the search on other grounds. See, *e.g.*, *United States v. Knights*, 534 U.S. 112, 118-121 (2001) (noting that the government defended search of probationer’s home on the theory that probationer consented to the search as a condition of probation, but upholding search instead on the theory that search of a probationer’s home is reasonable under the totality of the circumstances if it is based on reasonable suspicion).

ject's] life.” *United States v. Cuevas-Perez*, No. 10-1473, 2011 WL 1585072, at *3 (Apr. 28, 2011) (opinion of Cudahy, J.). Although *Cuevas-Perez* eliminates a conflict with the Seventh Circuit, the decision also highlights the need for this Court's intervention.

In *Cuevas-Perez*, federal agents tracked the defendant's vehicle using a GPS device for 60 hours as it traveled from Arizona to Illinois. Those facts produced three separate opinions that reached different conclusions about whether that monitoring constituted a search. Judge Cudahy left open the possibility that prolonged monitoring could become a Fourth Amendment search if it was sufficiently lengthy to expose “the twists and turns of [the subject's] life,” but he concluded that the 60-hour GPS surveillance of the defendant's vehicle was not sufficiently lengthy to constitute a search. *Cuevas-Perez*, No. 10-1473, 2011 WL 1585072, at *3. In a concurring opinion, Chief Judge Flaum also concluded that no search had occurred, but he did so on the grounds that GPS monitoring of a vehicle's public movements “falls squarely within the Court's consistent teaching that people do not have a legitimate expectation of privacy in that which they reveal to third parties.” *Id.* at *4. Chief Judge Flaum explained that in holding otherwise, the D.C. Circuit had “construct[ed] a framework for analyzing GPS monitoring based on an unsound constitutional foundation.” *Ibid.* And Judge Wood, in a dissenting opinion, not only endorsed the D.C. Circuit's holding in this case, *id.* at *13, but she also concluded that the 60-hour surveillance of the defendant's trip from Arizona to Illinois was sufficiently lengthy to constitute a search, *id.* at *20. The three opinions in *Cuevas-Perez* make clear that this Court's intervention is necessary not only to provide much-

needed guidance to law enforcement officers, *supra* pp. 1-4, but also to provide guidance to the lower courts.

C. The Decision Below Is Incorrect

Respondent's contentions (Br. in Opp. 13-19, 29-32) that the D.C. Circuit's decision is correct should not affect whether the Court grants certiorari to resolve a circuit conflict on an important question of federal law. In any event, respondent's defense of the court of appeals' decision is unpersuasive.

Respondent attempts (Br. in Opp. 13-19) to distinguish *Knotts* and *Karo* on the grounds that the government in those cases "actually observed the movements of the defendants on public thoroughfares." *Id.* at 14. Although that may be true of the investigation in *Knotts*, where the defendant drove 100 miles from Minnesota to Wisconsin, 460 U.S. at 277,⁴ it is incorrect with respect to *Karo*. In *Karo*, agents placed a tracking device in a can of ether and left it there for five months as the can was transported between different locations. 468 U.S. at 708-710. Officers did not conduct visual surveillance of the can during the entire five months; they used the beeper at various points to locate the can as it was moved to different locations. *Ibid.*

If respondent's argument is that some visual surveillance during prolonged electronic monitoring ensures that use of an electronic tracking device would not be a search, that theory would also apply here. The GPS device that officers used to track respondent's vehicle did not transmit data 24 hours a day; the device was in "sleeping mode" whenever the vehicle was not moving.

⁴ In *Knotts*, the officers ceased visual surveillance after the subject "began making evasive maneuvers," and they resumed surveillance an hour later after using the beeper to locate the vehicle. 460 U.S. at 278.

Gov't C.A. App. 68-70. And respondent's presence at the stash house where officers seized most of the evidence presented at respondent's trial was also established by visual surveillance, including videotape and photographs of respondent driving to and from that location. *Id.* at 75-76, 145-147; Resp. C.A. App. 844. But the Court's holdings in *Knotts* and *Karo* were not based on police officers' use of beepers to supplement visual surveillance. Those decisions were based on the principle that a person "traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Knotts*, 460 U.S. at 281; *id.* at 281-282 (movements were "voluntarily conveyed to anyone who wanted to look"); *Karo*, 468 U.S. at 713-714 (beeper revealed only information that "could have been observed by the naked eye").

Respondent's further contention (Br. in Opp. 31-32) that *Bond v. United States*, 529 U.S. 334 (2000), and the flyover cases, see *California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989), provide support for the court of appeals' "likelihood" analysis rests on a misunderstanding of those opinions. In those cases, the Court considered the defendant's expectations about whether someone would manipulate his luggage or peer into his backyard to determine whether the defendant had effectively exposed a private item or area to public view. Pet. 17-18. In contrast, the movements of respondent's vehicle were clearly exposed to the public. See *Knotts*, 460 U.S. at 285.

D. The Court Should Not Review The Additional Question Presented By Respondent

Finally, respondent contends (Br. in Opp. 33-34) that if the Court grants the petition, it should also review

another question presented by respondent in the court of appeals, which the court did not address: whether the installation of a GPS device on respondent's vehicle violated the Fourth Amendment. This Court does not ordinarily review questions that were not specifically decided by the court of appeals, see, *e.g.*, *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 414 (1982), and there is no reason to do so here.

The courts of appeals are not in disagreement about whether the installation of an electronic monitoring device on a vehicle constitutes a Fourth Amendment search or seizure. Respondent does not contend otherwise. The only authority respondent cites in support of his position is Judge Kleinfeld's concurring opinion in *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999), which concludes that installation of a GPS device on an automobile is a Fourth Amendment seizure. *Id.* at 1133. The majority in *McIver*, however, concluded that installation is not a seizure because it does not "meaningfully interfere" with the owner's possessory interest in his vehicle. *Id.* at 1126-1127. The other courts of appeals that have considered this question agree that installation of a GPS device does not violate the Fourth Amendment. *Garcia*, 474 F.3d at 997; *Marquez*, 605 F.3d at 610.

Respondent contends (Br. in Opp. 25-26) that the question presented "cannot meaningfully be reviewed" without also considering whether the installation was a search, but that is not the case. If the Court were to grant certiorari and reverse with respect to whether prolonged GPS monitoring constitutes a search, the court of appeals could consider on remand petitioner's alternative argument that installation of the GPS device violated the Fourth Amendment. See, *e.g.*, *Kentucky v.*

King, No. 09-1282 (May 16, 2011), slip op. 17 (reversing court of appeals’ judgment with respect to whether officers may rely on a foreseeable exigency to justify warrantless entry, and stating that preliminary question of whether exigency existed “is better addressed * * * on remand”).

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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